

3059

03978



J. Lept...

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-188971

DATE: September 27, 1977

MATTER: Department of Labor, Employment Training
Administration--Retroactive Temporary Promotion

DIGEST: Department of Labor seeks a ruling on legality of employee retroactive temporary promotion that it effected when its intent to permanently promote and reassign a GS-3 employee to a GS-4 position effective on August 4, 1975, was frustrated through improper merit staffing procedures. Personnel actions may not be made retroactively effective absent an unjustified or unwarranted personnel action that deprived employee of vested right. Because employee had no vested right to a promotion, action was improper, however, erroneous payments may be waived under 5 U.S.C. § 5584.

This action involves a request from Mr. Albert J. Angebrannt, Administrator, Administration and Management, Employment and Training Administration (ETA), Department of Labor, Washington, D.C., for a ruling on the legality of a retroactive temporary promotion that ETA made on September 24, 1975, retroactive to August 4, 1975. The legality of the retroactive temporary promotion was originally questioned by the Civil Service Commission (CSC) in its report on a review of ETA merit staffing actions in which it advised ETA to obtain a determination from this Office.

The factual situation of the case is relatively uncomplicated. In early June 1975, a certain ETA office requested the personnel office to fill an entry level grade GS-4 clerical position. Several applications for the position were referred to that office for review, which resulted in the selection of a grade GS-3 employee. The Personnel Specialist who was servicing the request, reviewed the applications to insure that qualification requirements had been satisfied and then contacted the employee's office and negotiated a release date of August 4, 1975. This action was erroneous in that agency merit staffing procedures had not been complied with as required by regulations. The error, however,

B-188971

was not recognized by the Personnel Specialist, who subsequently went on emergency leave in late July 1975 for several days. Several weeks had elapsed when the agency detected the error.

To correct this error, the personnel office formally announced the position under merit staffing procedures. It was decided to give the employee who had been erroneously placed in the position a retroactive temporary promotion to grade GS-4 effective as of August 4, 1975, to compensate her for not having been promoted when she was erroneously placed into the position. As a result of questions raised by CSC concerning the legality of this action, a ruling is being requested from our Office.

Our decisions have generally held that personnel actions, including promotions, may not be made retroactively effective absent an unjustified or unwarranted personnel action that deprived an employee of a vested right granted by mandatory provision of law, regulation, or agreement. See 55 Comp. Gen. 42 (1975) and decisions cited therein. In the instant case, there does not appear to have been a mandatory provision of law, regulation, or agreement that required the promotion of the employee in question on August 4, 1975, or on any other specific date. Accordingly, we have concluded that there was no authority under the Back Pay Statute, 5 U.S.C. § 5596 for the retroactive temporary promotion of the employee.

However, in order to avoid undue hardship and inequity, erroneous overpayments made in connection with this retroactive temporary promotion may be considered for waiver under the provisions of 5 U.S.C. § 5584 and 4 C.F.R. §§ 91.4 and 91.5, governing the standards for waiver of claims for erroneous payment of pay and allowances.


Acting Comptroller General
of the United States